UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 155

Docket No. PH-0432-09-0551-I-1

Susan C. Sanders,

Appellant,

v.

Social Security Administration,

Agency.

July 26, 2010

Susan C. Sanders, Nanticoke, Pennsylvania, pro se.

Justin A. Coon and Kathleen Louise Henley Petty, Baltimore, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision sustaining her removal for unacceptable performance. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we, therefore, DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and SUSTAIN the appellant's removal.

BACKGROUND

¶2 The appellant was a GS-0303-06 Benefits and Records Technician with the agency's office in Wilkes-Barre, Pennsylvania. Initial Appeal File (IAF), Tab 1 at 7; Tab 5, Subtab 4d. On November 3, 2008, the agency placed the appellant on a 120-day "Opportunity to Perform Successfully (OPS)" plan. *Id.*, Subtab 4bb. The OPS plan informed the appellant that her performance had been deficient in three of the four critical elements of her position. *Id.* The OPS plan indicated the standards for each of those critical elements, how the appellant's performance was deficient in each of the elements, and what the appellant needed to do to bring her performance of those elements to the satisfactory level. *Id.* The plan also indicated the training, assistance, and review that would be provided to the appellant to help her achieve satisfactory performance. *Id.* The plan instructed the appellant that, if she believed her unacceptable performance was due to a handicapped/medical condition, she should provide the agency with any necessary medical documentation and requests for accommodation. *Id.* at 6.

¶3 At the conclusion of the 120-day OPS period, the agency determined that the appellant's performance was "Not Successful." IAF, Tab 5, Subtab 4l. The agency then proposed to remove the appellant as a result of her failure to attain an acceptable level of performance. *Id.*, Subtab 4k. The appellant provided written and oral responses to the proposed removal with the assistance of her union representative. IAF, Tab 5, Subtabs 4e at 1, 4g. The agency issued an April 29, 2009 decision letter finding that the appellant's performance remained unacceptable in the three critical elements set forth in the OPS plan, and it removed the appellant effective April 30, 2009. *Id.*, Subtabs 4d-4e.

¶4 The appellant filed a timely appeal in which she sought a hearing on her claims that the agency did not give her a reasonable opportunity to improve her performance, and that the action constituted disability discrimination as a result of her "possible impediment in some cognitive or learning – functions." IAF, Tab 1 at 8-11. A hearing was held on October 8, 2009, and the parties were

permitted to present oral closing arguments on October 14, 2009. IAF, Tabs 22, 24.

¶5 In the initial decision, the administrative judge found that the agency proved by substantial evidence that: the Office of Personnel Management (OPM) had approved the agency's performance appraisal system; the appellant's performance standards were reasonable and based on objective criteria; the performance standards and critical elements were timely communicated to the appellant; the appellant was informed of how her performance of three of the critical elements was deficient and what she needed to do to bring her performance of those elements to a satisfactory level; the agency afforded the appellant the opportunity to improve her performance with assistance; and the appellant had failed to bring her performance to an acceptable level during the OPS period. IAF, Tab 23, Initial Decision (ID) at 2-6. The administrative judge found that the appellant failed to prove her affirmative defense of disability discrimination based on her asserted learning disability. ID at 6-8.

¶6 The appellant filed a timely petition for review, and subsequently submitted replacement pages for the petition, which allegedly correct grammatical errors in her original, timely filed petition.[1] Petition for Review File

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[1] On January 27, 2010, after the close of the record on review, the appellant filed another substituted petition, which allegedly contains more grammatical corrections and no new substantive argument. PFR File, Tab 6. On February 19, 2010, the appellant filed an unauthorized reply to the agency's response to her petition. PFR File, Tab 7. The agency filed a motion to strike the appellant's substituted petition and her reply to its response as untimely and unauthorized under the Board's regulations. PFR File, Tab 9. On March 11, 2010, the appellant filed a response to the agency's motion to strike her untimely and unauthorized filings. PFR File, Tab 10. In reaching our decision in this case, we have not considered the appellant's January 27, 2010, February 19, 2010, or March 11, 2010 submissions because they are not authorized under our regulations and were untimely filed without a showing that they are based on evidence that was not readily available prior to the close of the record on review. *See* 5 C.F.R. § 1201.114(a)-(i); *Pimentel v. Department of the Treasury*, 107 M.S.P.R. 67, ¶ 3 n.* (2007); *White v. Social Security Administration*, 76 M.S.P.R. 447, 459 n.8 (1997), *aff'd*, 152 F.3d 948 (Fed. Cir. 1998) (Table).

(PFR File) Tabs 1, 3. The agency filed a timely response in opposition to the appellant's original petition. PFR File, Tab 4.

ANALYSIS

The appellant was not denied the right to a fair hearing or the ability to call relevant witnesses.

¶7 The appellant appears to assert that she was denied the right to a fair hearing because she was not provided with free counsel. PFR File, Tab 1 at 6. The Board has held that there is no statutory or regulatory requirement that an appellant be provided with pro bono counsel. *See Swanson v. Office of Personnel Management*, 14 M.S.P.R. 3, 4 (1982), *aff'd*, 785 F.2d 322 (Fed. Cir. 1985), *cert. denied*, 476 U.S. 1123 (1986). The administrative judge did permit the appellant to have a coworker, Rebecca Malesky, assist her during the hearing. Hearing Tapes (HT), Side 1A. We find that the appellant failed to show that the administrative judge erred in adjudicating this appeal without making a provision for the appellant to receive the assistance of pro bono counsel.

¶8 The appellant also asserts that the administrative denied her the right to call certain witnesses. PFR File, Tab 1 at 8. The administrative judge did sustain the agency's objections to two of the appellant's proposed witnesses: Lisa Falzone and Rebecca Malesky. IAF, Tab 19 at 2. In addition, the administrative judge informed the appellant that she would entertain the appellant's request to call Cindy Sipple as a rebuttal witness after the agency had presented its case. *Id.* These rulings were memorialized in the prehearing conference summaries. IAF, Tabs 18, 19.

¶9 The record reflects that the administrative judge gave the parties the opportunity to state any objections or corrections or additions to the prehearing conference summaries at the start of the hearing, and the appellant did not raise any objections to the content of the summaries. HT, Side 1A. Thus, the appellant failed to preserve this issue for review by objecting to the

administrative judge's ruling excluding her requested witnesses when given the opportunity to do so. *See Nichols v. U.S. Postal Service*, 80 M.S.P.R. 229, ¶ 7 (1998); *Germino v. Department of Defense*, 61 M.S.P.R. 683, 690 (1994), *aff'd*, 52 F.3d 345 (Fed. Cir. 1995) (Table).

¶10 Moreover, an administrative judge has wide discretion to control the proceedings, including the authority to exclude testimony she believes would be irrelevant, immaterial, or unduly repetitious. *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 20 (2007); *Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 8 (2000). The Board has said that in order to "obtain reversal of an initial decision on the ground that the administrative judge abused his discretion in excluding evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed." *Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶ 12 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005). On review, the appellant claims that one witness, Cindy Sipple, was improperly excluded. PFR File, Tab 1 at 7; IAF, Tab 5, Subtab 4g. At the conclusion of the appellant's hearing testimony, the administrative judge asked the appellant if she wanted to call Sipple as a rebuttal witness. HT, Side 5A. The appellant indicated that she wanted to call Sipple to rebut the testimony of her supervisor/proposing official, Michelle Bohlin, that the appellant had not provided her with a copy of a medical report prior to the removal proposal. HT, Side 5A. However, the appellant admitted that Sipple was not present when she allegedly handed Bohlin the report. *Id.* The administrative judge found that Sipple did not have personal knowledge of when the appellant provided Bohlin with the report and that Sipple's testimony would not, therefore, be relevant. *Id.* Thus, the administrative judge did not permit the appellant to call Sipple as a witness. *Id.* Because the exclusion of Sipple was well within the discretion of the administrative judge, we find that the appellant has failed to show error in the denial of her requested witnesses.

The administrative judge properly found that the agency provided the appellant with a reasonable opportunity to improve her performance of the three critical elements prior to taking the performance-based removal action.

¶11 An agency may reduce in grade or remove an employee for unacceptable performance pursuant to 5 U.S.C. § 4303 when the agency proves through substantial evidence that: (1) the appellant's performance fails to meet the established performance standards in one or more critical elements of her position; (2) the agency established performance standards and critical elements and communicated them to the appellant at the beginning of the performance appraisal period; (3) the agency warned the appellant of the inadequacies of her performance during the appraisal period and gave her an adequate opportunity to improve; and (4) after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 6 (2008).[2] Substantial evidence is that degree of evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. *See* 5 C.F.R. § 1201.56(c)(1).

¶12 The appellant makes several generic objections with regard to the administrative judge's findings that the agency provided her with a reasonable opportunity to improve her unacceptable performance. The first objection is to the administrative judge's finding that an employee who made three or more errors in processing a batch of CDR forms was subjected to a review of 100% of the employee's CDR work. PFR File, Tab 1 at 2. Although the appellant alleges that this did not occur for all employees who made more than three errors, the administrative judge merely noted the fact that 100% of the appellant's CDR work was reviewed for errors and the appellant does not dispute that fact. The

[2] The agency also has the burden of proving that OPM has approved the agency's performance appraisal system if the appellant specifically raises such a challenge, but the appellant did not raise this issue in the instant case. *See Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶¶ 11-12 (1999); ID at 4.

administrative judge's point is that the appellant was mentored as to all of her CDR work. Thus, the appellant's objection to the administrative judge's factual statement is irrelevant, because she has not shown that it was erroneous as to her.

¶13 The appellant also reasserts on review that, instead of using the number of errors per batch of processed CDR forms in determining satisfactory performance, the agency should have used an error percentage rate per batch, and if the agency had done so, her asserted percentage rate of 94% correctly processed forms would have demonstrated satisfactory performance. *Id.* at 2-3. However, "managers of federal agencies, not the members of the Board, have the authority to decide what agency employees must do in order to perform acceptably in their particular positions." *Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, ¶ 14 (2004). "Thus, under a plain-language interpretation of section 4302(b)(1), an agency is free to set its performance standards as high as it thinks appropriate, so long as those standards are objective and meet the other express requirements of section 4302(b)(1)." *Id.* The appellant does not dispute that she was aware of the agency's performance standards and, while the appellant may disagree with those standards, the Board has no authority to change those standards as the appellant suggests. *Id.*

¶14 We also see no error in the administrative judge's finding that the agency provided the appellant a reasonable opportunity to improve her deficient performance. The agency provided mentoring for two hours per day, twice a week, alternating between available Lead Technicians to do the mentoring. The appellant does not assert that she failed to receive the initial CDR training received by all of the Benefits and Records Technicians. Rather, she claims that the agency should have provided her with one-on-one mentoring, using the same mentor, and that the mentoring should have continued all day long until such time as she had been fully trained in the processing of CDR forms. PFR File, Tab 1 at 3-4. However, the administrative judge concluded, and we agree, that it would

have been unreasonable to require the agency to have, in effect, two people assigned to do the appellant's work. ID at 8-9.

¶15 The appellant objects to the administrative judge's finding that the appellant's supervisor met with her biweekly during the OPS period to discuss the appellant's deficiencies and ways to improve. PFR File, Tab 1 at 4. The appellant acknowledges the biweekly meetings, but simply asserts without explanation, that she did not understand her supervisor's suggestions for improvement. *Id.* The administrative judge found that the appellant's supervisor "tried everything she could think of to assist [the appellant], including implementing some of the appellant's suggestions, to no avail." ID at 6. Given that the agency even implemented some of the appellant's suggestions to improve her performance, the appellant's unexplained assertion does not show that the agency failed to provide her with a reasonable opportunity to improve her deficient performance.

The administrative judge properly found that the appellant failed to prove her affirmative defense of disability discrimination through preponderant evidence.

¶16 The administrative judge properly informed the appellant that, in order to prove a failure to accommodate disability discrimination claim, the appellant had to prove that she is a disabled person, that the action appealed was based on her disability and, to the extent possible, she must articulate a reasonable accommodation under which she believes she could perform the essential duties of her position or of a vacant funded position to which she could be reassigned. IAF, Tab 19 at 2-3; *see Henson v. U.S. Postal Service*, 110 M.S.P.R. 624, ¶ 6 (2009). As a federal employee, the appellant's claim arises under the Rehabilitation Act of 1973. However, the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act, and they are applied to determine whether there has been a Rehabilitation Act violation. *See* 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R.

§ 1614.203(b). Further, the ADA regulations superseded the Equal Employment Opportunity Commission's (EEOC's) regulations under the Rehabilitation Act. *See Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7-8 (2005) (stating that 29 C.F.R. § 1614.203(g) and other portions of the regulations at 29 C.F.R. § 1614.203 were repealed on June 20, 2002, and the ADA regulations at 29 C.F.R. part 1630 were made applicable to cases under the Rehabilitation Act); 29 C.F.R. § 1614.203(b).

¶17 The ADA Amendments Act of 2008 (ADAAA), which liberalized the definition of disability, became effective on January 1, 2009. *See* P.L. No. 110-325, 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12101 *et seq*. The appellant was removed effective April 30, 2009, and the provisions of the ADAAA are therefore applicable to this case. The ADAAA defines "disability," to mean: "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment (as described in paragraph (3))." *See* 42 U.S.C. § 12102(1)(A)-(C). "Major Life Activities" is defined in general to include, but not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *See* 42 U.S.C. § 12102(2)(A).

¶18 The ADAAA prohibits discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *See* 42 U.S.C. § 12112(a). The ADAAA defines "qualified individual," in part, to mean "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *See* 42 U.S.C. § 12111(8).

¶19 As indicated above, federal employee disability discrimination claims are currently reviewed using the EEOC's ADA regulations under 29 C.F.R. part 1630. Although the ADAAA's definition of "disability" remains the same as it existed under the ADA, Congress changed the meaning of the terms used to define "disability" and added rules of construction for the interpretation of those terms. *See* 42 U.S.C. § 12102(2)-(4). On September 23, 2009, EEOC issued a Federal Register notice of proposed rule making in which it set forth its proposed changes to 29 C.F.R. part 1630, to make those regulations consistent with the ADAAA. 74 Fed. Reg. 48431 (Sept. 23, 2009). The 60-day notice and comment period on the proposed changes closed on November 23, 2009. *Id.* On December 7, 2009, EEOC issued a Federal Register notice, "Statement of Regulatory and Deregulatory Priorities," in which it indicated its intent to have its ADAAA regulations finalized by July 2010. 74 Fed. Reg. 64340, 64341 (December 7, 2009).

¶20 The record supports the administrative judge's finding that the appellant has a learning disability, based on the medical evidence showing that, since childhood, the appellant has been a "slow learner." IAF, Tab 5, Subtabs 4h at 4, 4g at 1, 4, 6-7 ("Tests of her cognitive functioning revealed low average range intellectual and academic skill."); Tab 20 at 3 ("As stated in the report, Ms. Sanders is of average intellectual ability and anticipated to be able to perform a job which an individual of average intelligence is capable of performing."). However, the appellant has acknowledged that her asserted learning disability has only affected her ability to process the CDR forms that are now a part of her duties as a Benefits and Records Technician. IAF, Tab 5, Subtab 4h at 3-4; PFR File, Tab 1 at 4 ("Within my early conversations with [her supervisor], I may have mentioned my perception of being a slow learner. However, I would never have even guessed at that point in time, on having a medical evaluation, because it was not an issue to my life's performances of job performances.").

¶21 Additionally, the appellant asserts that the administrative judge erred in finding that she had requested as a reasonable accommodation that the agency provide her with a mentor for 8 hours per day during the 120-day OPS period. PFR File, Tab 1 at 5. In fact, the appellant herself testified that this is what she required as an accommodation. HT, Side 5A. Specifically, she testified that the agency should have had the same Lead Technician sit with her for 8 hours per day and mentor her one-on-one in the processing of the forms as she processed each form. *Id.*

¶22 Moreover, the administrative judge did not err in finding that the appellant's requested accommodation was not reasonable because it would have, in effect, required the agency to assign two people to perform her work. ID at 8.[3] A reasonable accommodation is intended to allow an employee with the necessary job skills to overcome her disability so as to be able to fully perform the essential functions of her position. *See Clemens v. Department of the Army*, 104 M.S.P.R. 362, ¶ 13 (2006). Despite the mentor training during the 120-day OPS period, the record reflects that the appellant was, at the end of the OPS period, still making the same errors in processing the CDR forms. IAF, Tab 5, Subtab 4k at 2, 6. Thus, the appellant's asserted accommodation would have required the agency to assign her a full-time mentor to assist her in performing the essential functions of her position on an on-going basis. We agree with the administrative judge that the appellant's asserted accommodation was unreasonable and would have negatively affected the agency's ability to conduct business. *See id.*

¶23 The appellant objects to the administrative judge's finding that she failed to prove that there was a funded available position for which she was qualified to

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[3] EEOC's ADA regulations include the following consideration of when an agency need not provide a requested accommodation because it would result in an undue hardship to the agency: "The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business." 29 C.F.R. § 1630.2(p)(v). That regulatory provision is not the subject of a proposed change as a result of the ADAAA.

which she could have been reassigned. PFR File, Tab 1 at 7; ID at 9. She asserts that she had requested that agency provide her with a position in the mailroom. *Id.* However, during the hearing, the administrative judge reminded the appellant of the deciding official's testimony that there were no funded available positions for which she was qualified and asked the appellant if she had any evidence showing that such a position was available. HT, Side 5A. The appellant admitted that there were no other positions available. *Id.* The appellant has not asserted on review that she has previously unavailable evidence showing that such a position was available. Thus, the appellant has not shown error in the administrative judge's finding.

The appellant is entitled to notification of her "mixed" case appeal rights.

¶24 Lastly, we note that the initial decision did not inform the appellant of her mixed-case appeal rights, even though the administrative judge adjudicated the appellant's disability discrimination claim. We have therefore included proper notice of the appellant's further review rights here.

ORDER

¶25 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other

issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.